

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

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PUBLIC EMPLOYMENT
RELATIONS BOARD

MICHAEL E. FROST,
Appellant,

and

STATE OF IOWA (DEPARTMENT OF
ADMINISTRATIVE SERVICES),
Appellee.

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CASE NOS. 07-MA-01
07-MA-02

RULING

This matter is before us upon our order granting in part Michael Frost's application for interlocutory review of a ruling issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board). Our review is of the ALJ's ruling on the State's motion to quash subpoenas. Frost requested the subpoenas in connection with the evidentiary hearing set for his consolidated grievance appeals filed pursuant to Iowa Code section 8A.415(1).

By ruling dated February 20, 2008, the ALJ granted the State's motion to quash seven subpoenas. The ALJ denied the motion to quash three other subpoenas, but ruled that some of the proffered testimony of those three witnesses was irrelevant to Frost's claims, and that compelling their attendance at hearing would thus subject them to an undue burden.¹ Following

¹ Three subpoenas were unopposed: Nancy Berggren, Mary Ann Hills, and Jeffrey Panknen. Seven subpoenas were quashed: John Baldwin, Anna Fengel, Jerome Groff, Terry Mapes, Rob Porter, Michael Prey, and Susan Pritchard. Three subpoenas were subject to the motion, but were allowed: Mollie Anderson, Janelle Bertrand, and Dave Kraayenbrink.

the ALJ's ruling, Frost filed a petition for review, which we treated as an application for our discretionary review of an ALJ's interlocutory ruling. In response to Frost's application for review, the State filed a resistance.

In our ruling on Frost's application, we denied Frost's request for review of the ALJ's ruling which she characterized as addressing allegations of statutory or rule violations "which are not legitimately at issue." We believed this portion of the ALJ ruling to be plainly correct. Additionally, we denied Frost's request to review the relevance of what Frost characterizes as his "due process" evidence. As we indicated, even if we were to assume that we are an appropriate forum for a constitutional claim (as opposed to a claim of a lack of substantial compliance with an applicable statutory or DAS rule provision), we think it clear that the imposition of a written reprimand and the manner in which a third-step grievance meeting is conducted does not implicate constitutional due process protections.

We granted limited review of the ALJ's ruling as it relates to proffered testimony for the requested subpoenas on Frost's other claims and ordered the scheduling of oral arguments for this review.

Oral arguments were presented to the Board on July 14, 2008, by Michael Frost, pro se, and Robert Porter, Assistant

Attorney General, for the State. At hearing, the parties narrowed the scope of our review to five subpoenas.² They include three subpoenas for Anna Fengel, Jerome Groff, and Susan Pritchard, which the ALJ determined should be quashed. The other two subpoenas, for Janelle Bertrand and Dave Kraayenbrink, were allowed by the ALJ, but were limited to testimony which the ALJ found relevant.

The subpoenas for these five witnesses are at issue and are the subject of our review: Fengel, Groff, Pritchard, Bertrand, and Kraayenbrink. The ALJ had found all or portions of their proffered testimonies to be irrelevant based on the manner in which Frost generalized the testimonies' relevance. Consequently, the ALJ determined that the subpoenas subjected the witnesses to undue burden and she quashed or modified the subpoenas pursuant to Iowa R. Civ. P. 1.1701(2)(c)(1).

In accordance with this rule, upon timely motion, subpoenas shall be quashed or modified, if the subpoena does any of the following:

1. Fails to allow reasonable time for compliance.
2. Requires a person who is not a party or an officer of a party to travel to a place outside of the county in which that person resides, is employed or regularly transacts business in person, except that, such a person may be ordered

² Frost withdrew his request for four subpoenas: Baldwin, Mapes, Porter, and Prey. The State withdrew its motion to quash Anderson's subpoena.

- to attend trial anywhere within the state in which the person is served with a subpoena.
3. Requires disclosure of privileged or other protected matter and no exceptions or waiver applies.
 4. Subjects a person to undue burden.

Iowa R. Civ. P. 1.1701(2)(c)(1).

We agree that requiring a witness to appear at hearing to offer testimony which is plainly irrelevant to the case constitutes an undue burden for the witness. Accordingly, we review the potential relevance of Frost's proffered testimony to his claims.

Frost is employed by the Iowa Department of Administrative Services (DAS), Human Resources Enterprise. He filed his first grievance appeal, 07-MA-01, with PERB pursuant to Iowa Code section 8A.415(1). His grievance challenges a written reprimand issued by DAS for his e-mails, spanning 8/14/06 through 9/26/06, which allegedly violated a 2005 written performance expectation. In this appeal, Frost claims that the State did not substantially comply with Iowa Code sections 8A.416(1) and 8A.417(4), and DAS rules 11-60.2, 11-65.1, 11-65.2, and 11-66.5 in issuing the written reprimand.

Frost's second grievance appeal, 07-MA-02, filed pursuant to Iowa Code section 8A.415(1) challenges the manner in which the above-referenced grievance was processed, specifically the fact that a non-DAS employee conducted his third-step grievance

meeting. Frost asserts in his second appeal that the State did not substantially comply with Iowa Code sections 8A.415(1), 8A.416(1), and 8A.417(4), DAS subrules 11-61.1(1)(c) and 11-65.2(4), and DAS rule 11-65.1 in processing his first grievance.

The two grievance appeals advance many of the same claims. For each claim, Frost bears the burden of proving that the State failed to substantially comply with the applicable statutory provisions, rules, or subrules cited.

Frost's central claim is the absence of just cause for the written reprimand. He alleges an unfair investigation, disparate treatment, and excessive penalty. Related to this just cause claim and, at the heart of his other statutory or rule claims, is Frost's assertion that the written reprimand and the manner in which the State processed his grievance constituted reprisal for his communications and affiliations. Frost alleges that his communications constituted expressions of his political views and disclosure of information he reasonably believed to be evidence of prohibited activity by his employer.

According to Frost, the substantive content of his communications related to four subjects: (1) DAS' alleged illegal use of AFSCME-covered social worker positions at the Iowa Department of Corrections (DOC); (2) Pay inequity plans and positions within DAS; (3) Training assignments for DAS employees and Frost's discontinuance of volunteer training assignments;

and (4) DAS Director Anderson forwarding an e-mail, authored by Frost, to AFSCME, which resulted in AFSCME filing a Prohibited Practice Complaint against Frost.³

Frost argues issuance of the five subpoenas is necessary to present testimony relating to his just cause claim and his claim of reprisal action by the State. In the area of just cause, Frost seeks to introduce testimony on State standards and practices regarding just cause, investigations, and related written communications, such as directives and performance expectations. He also seeks to introduce testimony on how his supervisor, Mary Ann Hills, generally treated him and how other state employees were treated with regard to their e-mails. He anticipates opinioned testimony alleging deficiencies and bias in his supervisor's investigation of his e-mails and testimony relating to experiences and opinions of others concerning his prior e-mails and communications. Finally, he offers testimony relating to the regular discussion of pay issues by other state employees.

We find that testimony in the areas of objective standards and practices, the treatment of other employees, the manner in which Frost was treated, and customary discussions of pay issues by state employees may be relevant to Frost's just cause claim.

³ Because the State withdrew its motion to quash Anderson's subpoena, Frost was not required to advance this claim (in terms of relevance to testimony) to secure a subpoena for her testimony.

The testimony may assist the presiding officer in determining matters such as whether there was an unfair investigation, excessive penalty, or disparate treatment of Frost. With regard to opinioned testimony, to the extent that it consists of a comparison and contrast with objective standards to show deficiencies and bias in the investigation, it may be relevant to Frost's claims.

We find that testimony regarding e-mails Frost sent prior to the issuance of the performance expectation is plainly irrelevant to any of his stated claims. The e-mails that served the basis for the reprimand are distinguishable because Frost was subject to the performance expectation at the time he authored these e-mails. The legitimacy of the performance expectation and its effective period are potentially relevant issues, which may be addressed by testimony regarding State standards. Frost e-mails that were subject to the performance expectation, but did not serve as a basis for the reprimand, may also be relevant evidence.

Frost proffers testimony of each of the five witnesses with regard to the claim of reprisal for his communications regarding AFSCME covered social workers, pay inequity plans, and training. The anticipated testimony can be grouped into two categories. First, Frost offers testimony to establish what transpired, including his communications and the State's reactions. Next

is proffered testimony to explain the system and the accuracy of his communications. Frost contends that testimony regarding the accuracy of his communications is necessary to establish foundation for his claims.

We find that testimony as to Frost's communications, the State's reactions, and the timing of events may be relevant to Frost's claim of reprisal. Directly or indirectly, this testimony could establish one or more elements for several of his statutory and rule claims. As to testimony that explains the classification system, the pay inequity plans, and training, we agree that Frost should have the opportunity to provide witness testimony to establish foundation and the accuracy of his communications. Testimony as to the accuracy of his communications may be relevant in establishing his reasonable belief that he was disclosing information of prohibited conduct by his employer.

According to Frost, each of the five contested witnesses would testify to one or more of the above areas determined possibly relevant. It is our conclusion that subpoenas should issue for all five of the witnesses to allow Frost the opportunity to provide testimony which may be relevant to the outlined areas. In so concluding, we find the relevant testimony of Bertrand and Kraayenbrink may be broader in scope than the ALJ determined.

The main objective of our review is to determine whether the issuance of subpoenas would cause an undue burden on the witnesses. For this purpose, we consider Frost's burden of proof and the flexibility in case preparation that may be appropriate. We intentionally refrain from making relevance determinations regarding specific testimony. We leave the determination of relevance, undue repetition, materiality, and other specific evidentiary rulings to the authority and discretion of the presiding officer at the evidentiary hearing. Finally, we strongly encourage the parties to stipulate to as many facts as possible, including those that tend to establish the foundation of Frost's claims and the accuracy of his communications. We also strongly encourage Frost to reduce and/or limit his presentation of witnesses to the extent possible to fairly present his case without undue repetition.


Accordingly, we issue the following:

ORDER

The State's motion to quash the subpoenas for Janelle Bertrand, Anna Fengel, Jerome Groff, Dave Kraayenbrink, and Susan Pritchard is DENIED. In accordance with these findings, the administrative law judge shall issue subpoenas for their attendance and testimony at the evidentiary hearing.

DATED at Des Moines, Iowa, this 27th day of August, 2008

PUBLIC EMPLOYMENT RELATIONS BOARD


James R. Riordan, Chair


M. Sue Warner, Board Member


Neil A. Barrick, Board Member

File original.

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